I am somewhat surprised that the Law Society should raise such a technical objection in this matter particularly since Mr Lim had stated that the reason why the Law Society was objecting to the application was so as to obtain a ruling on whether they were at liberty to give an advocate and solicitor against whom the council was proposing to impose a penalty under s 85 of the Act, a copy of the report of the inquiry committee. Had the plaintiff in this action sought a declaration that he was entitled to a copy of the report of the inquiry committee, I would have granted the declaration. The plaintiff, however, has only sought an order for discovery. Having accepted the submission of Mr Lim that in the present case the court has no power to order discovery, I have to dismiss the application made herein. There will, however, in the circumstances of this case be no order as to costs.

Application dismissed.

Solicitors: *Palakrishnan & Partners*; *TQ Lim & Co.*

Reported by *S Surenthiraraj*

Lee Choon Peng & Anor v Lamco Building Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 219 OF 1991
CHUA J
26 APRIL 1991

Land Law — Caveat — Removal — Defendants had paid $250,000 earnest money pending the execution of a sale and purchase agreement — Negotiations conducted on the premise that the plaintiffs were to sell the property to a company in which the plaintiffs were directors and the defendants were then to purchase the property from the company — Sale and purchase agreement aborted — Caveat lodged by defendants — Whether defendants had an interest in the property sufficient to support the caveat

The plaintiffs were the legal and beneficial owners of a piece of land ('the property'). The defendants began negotiations with the plaintiffs to purchase the property, but subsequently, the negotiations were conducted on the premise that a company known as Grand Harvest Development Pte Ltd ('Grand Harvest') would purchase the property from the plaintiffs and then sell the property to the defendants. The plaintiffs were also directors of Grand Harvest. The defendants paid a non-refundable deposit of $250,000 as earnest money pending the signing of the sale and purchase agreement of the property. It was agreed that the earnest money would be forfeited if the sale and purchase agreement between Grand Harvest and the defendants was not executed by 16 November 1990.

The sale and purchase agreement was not executed. On 7 December 1990 and unknown to the plaintiffs, the defendants lodged a caveat against the property claiming an interest as purchasers of the property by virtue of the deposit paid to the plaintiffs for the purchase of the property.

The plaintiffs brought the present application for the cancellation or removal of the caveat lodged by the defendants against the plaintiffs' property. The issue was whether the defendants had an interest in the property sufficient to support the caveat.

Held, allowing the plaintiffs' application:

The last draft sale and purchase agreement showed that the intention was for the plaintiffs to convey the property to Grand Harvest and then for Grand Harvest (who were property developers) to develop the property for the defendants and then sell the property redeveloped to the defendants. There could be no doubt that the negotiations that took place were between the defendants and Grand Harvest. There was also no dispute that the sale and purchase agreement was aborted, and the defendants were not seeking specific performance of the sale and purchase of the property. The defendants' only claim was for the return of the earnest money of $250,000 paid to Grand Harvest and any dispute over the $250,000 was between the defendants and Grand Harvest. The defendants, therefore, did not have any interest in the property owned by the plaintiffs to entitle them to lodge the caveat.

Case referred to
1 *Re Hitchcock* (1900) 17 WN (NSW) 6

Legislation referred to
Civil Law Act (Cap 43, 1988 Ed) s 5
Registration of Deeds Act (Cap 269, 1989 Ed) s 8(1)(b)
Law of Property Act 1925 [UK] s 40(1)

Foo Soon Yien for the plaintiffs.
Patrick Yap for the defendants.

Cur Adv Vult

Chua J: This is an application by the plaintiffs for the following orders:

1 That the caveat entered on Volume 2501 No 16 of the register kept at the Registry of Deeds lodged by the defendants on 7 December 1990 against the plaintiffs' property situated at and known as 1 and 1A Keong Saik Road, Singapore and marked on the Government Resurvey Map as Town Subdivision 5 Lot 51-398, 51-425 and 51-426 and the plaintiffs' property situate at and known as 124 Neil Road, Singapore marked on the Government Resurvey Map Town Subdivision 5 Lot 51-19 be cancelled or removed from the said register.

2 That the defendants do pay the plaintiffs damages or loss occasioned by the defendants' wrongful retention of the said caveat.

At all material times, the plaintiffs were and are the legal and beneficial owners of the land and premises known as Nos 1 and 1A Keong Saik Road and No 124 Neil Road, Singapore hereinafter referred to as ('the property').

Sometime in late 1989 or early 1990, the defendants began negotiations with the plaintiffs directly and through their respective solicitors for the purchase of the property.

The plaintiffs at all material times were and are the directors of Grand Harvest Development Pte Ltd ('Grand Harvest').

Initially it was intended that the defendants purchase the property directly from the plaintiffs. Subsequently negotiations were conducted on the premise that Grand Harvest were to purchase the property from the plaintiffs and then sub-sell the property to the defendants. Messrs Bernard Rada & Lee acted for both the plaintiffs and Grand Harvest and Messrs KL Tan & Associates acted for the defendants.

The negotiations became protracted and at the end of September 1990, the parties agreed that the defendants should pay a non-refundable deposit of $250,000 as earnest money pending the signing of the sale and purchase agreement.

It was eventually agreed, on 5 October 1990, that the earnest money shall be forfeited in the event that the sale and purchase agreement between Grand Harvest and the defendants was not executed by 16 November 1990. The earnest money was paid by the defendants to Grand Harvest on 11 October 1990.

On 9 November 1990, Messrs Bernard Rada & Lee, the solicitors for Grand Harvest, sent a letter to Messrs KL Tan & Associates reminding them that the sale and purchase agreement must be signed on 16 November 1990, failing which the $250,000 shall be forfeited.

By 16 November 1990, the sale and purchase agreement was still not executed by the defendants. An extension of time was granted to the defendants to sign the agreement by 5pm on Friday, 23 November 1990, failing which the sum of $250,000 shall be forfeited.

On 22 November 1990, Messrs Bernard Rada & Lee again wrote to Messrs KL Tan & Associates stating, inter alia, their clients' instructions that it had been agreed that the sale and purchase agreement was to be signed by 5pm on 30 November 1990 and requesting confirmation of the same by 5pm on Friday, 23 November 1990, failing which the sum of $250,000 shall be forfeited.

On 24 November 1990, 28 November 1990 and 29 November 1990, Messrs KL Tan & Associates wrote to Messrs Bernard Rada & Lee to arrange for meetings between the parties.

On 13 December 1990, pursuant to the instructions from Grand Harvest, Messrs Bernard Rada & Lee wrote to Messrs KL Tan & Associates stating that the sale and purchase was abortive and that if the defendants were inclined to proceed with the purchase, Grand Harvest were prepared to sell to them at the increased price of $11.25m as stated in their letter of 22 November 1990.

On 14 February 1991, Messrs KL Tan & Associates wrote to Messrs Bernard Rada & Lee requesting Grand Harvest to return the $250,000 to the defendants within the next seven days as the purchase of the property was abortive.

On 7 December 1990, unknown to the plaintiffs, the defendants lodged the caveat against the property. On 14 February 1991, on being informed of the caveat, Messrs Bernard Rada & Lee wrote to Messrs KL Tan & Associates stating that the earnest money of $250,000 had been forfeited and requested that steps be taken to remove the caveat forthwith.

The defendants have to date failed to remove the caveat.

The defendants lodged the caveat under the provision of s 8(1)(b) of the Registration of Deeds Act (Cap 269, 1989 Ed) ('the RODA') which provides:

> 8(1) Subject to this section and the rules, a caveat in respect of any land may be —
>
> (b) lodged by any person claiming an estate or interest in the land.

The defendants stated in the caveat that they are claiming as purchasers of the property and that the ground of their claim is by virtue of a deposit paid to and received by the plaintiffs for the purchase of the property.

The question here is whether the defendants have an interest in the property sufficient to support the caveat. A caveat against dealings has been described by Owen J in *Re Hitchcock*[1] at p 63 as 'nothing more than a statutory injunction to keep the property in status quo until the court has had an opportunity of discovering what are the rights of the parties'.

The submission of counsel for the plaintiffs is this: there is no dispute that the sale and purchase of the property was abortive — both parties confirm that to be so. The defendants are not asking for specific performance of the sale of the property to them. The only claim of the defendants is for the refund of the earnest money of $250,000. The sale and purchase agreement has not been signed between the defendants and Grand Harvest or the plaintiffs and no option has been given to the defendants for the purchase of the property. The earnest money of $250,000 was not paid for the purchase of the property and furthermore it was paid to Grand Harvest and not the plaintiffs. In any event the defendants do not have a valid claim for the refund of the earnest money of $250,000 on the facts of the case.

The arguments of counsel for the defendants are these: the defendants have an interest in the property as negotiations were carried out by the defendants with the plaintiffs on the basis as though the plaintiffs were selling the property to the defendants. Grand Harvest was

only the vehicle used in the transaction. For all intents and purposes, the defendants had negotiated to purchase the property from the plaintiffs; the earnest money was paid on the understanding that it would subsequently go towards the purchase price and the plaintiffs would transfer title to the property to Grand Harvest at a later date.

Counsel submits that there is an agreement on which the defendants can bring an action for the sale of the property to them. He submits that there is a memorandum in writing sufficient to comply with the requirements of s 40(1) of the English Law of Property Act 1925 (which is applicable to Singapore by virtue of s 5 of the Civil Law Act (Cap 43, 198 Ed)).

He argues that there is such a memorandum by virtue of the following documents:

(a) The draft sale and purchase agreement, especially the last draft enclosed in the letter of 16 November and exhibited as STPL-8.
(b) The receipt for the earnest money.
(c) The letter of 13 December 1990, to KL Tan & Associates in which it was stated: 'The terms of the draft sale and purchase agreement, as you are aware, has been more or less settled.'

Counsel argues that the defendants were willing to go through the purchase but the purchase price had been increased by the plaintiffs unilaterally. Now the plaintiffs wanted to keep the $250,000 and sell the property to a third party at a higher price. Counsel submits that the defendants have a purchasers' lien and therefore have an interest in the property within the meaning of s 8(1)(b) of the RODA.

I am unable to accept counsel's submission that the negotiations were all the time conducted between the defendants and the plaintiffs. At the initial stages negotiations were conducted between Stanley Tan Poh Leng, a director of the defendants, with the first plaintiff. On 12 September 1990, Messrs KL Tan & Associates wrote to Messrs Bernard Rada & Lee referring to the meeting on 7 September 1990, and enclosed a new draft of the sale and purchase agreement for their comments, stating that the draft agreement was subject to the defendants' comments and to the bank's approval and asked for information and documents to be annexed to the agreement as schedules for the defendants' perusal. Finally, they asked when the title of the property would be transferred to Grand Harvest.

The following facts emerged from the draft sale and purchase agreement:

(a) The agreement is between Grand Harvest and the defendants.
(b) Grand Harvest is seised in fee simple of the property.
(c) The property has been gazetted by the Urban Redevelopment Authority as a conservation area to form part of the Bukit Pasoh Conservation area.
(d) Grand Harvest is desirous of selling the property with an undertaking to redevelop, restore and renovate the property and the buildings thereon in accordance with the terms and conditions provided in the agreement.
(e) The defendants are desirous of buying the property duly renovated and restored.
(f) Grand Harvest shall sell and the defendants shall purchase the property on the terms and conditions provided in the agreement.
(g) The sale and purchase of the property is subject to the completion of the project by Grand Harvest and Grand Harvest undertake to redevelop, restore and renovate the property and the building thereon for delivery to the defendants on the completion date.
(h) The consideration is $10.25m payable by the defendants in the manner set out in the agreement.
(i) Grand Harvest warrant that written permission from the relevant authorities for the change of use of the property to shop/office has been obtained.
(j) Grand Harvest shall upon the signing of the agreement, at their cost and expense, cause the redevelopment of the property and the building thereon in a good and workmanlike manner and in accordance with the architectural drawings and plans as approved by the authorities and in accordance with the specifications as set out in Schedule 3 which have been accepted and approved by the defendants.

It is clear from the draft sale and purchase agreement that what was going to take place was that the plaintiffs would convey the property to Grand Harvest and Grand Harvest, which are property developers, would develop the property for the defendants and Grand Harvest would sell, with vacant possession, the property redeveloped to the defendants. There can be no doubt that the negotiations that took place were between the defendants and Grand Harvest.

There can be no dispute that the sale and purchase of the property was abortive. Both parties confirm that to be so. The defendants are not seeking specific performance of the sale of the property to them. The only claim of the defendants is for the return of the earnest money of $250,000. The earnest money of $250,000 was paid to Grand Harvest and not to the plaintiffs. It was Grand Harvest that have forfeited their earnest money, not the plaintiffs. Any dispute over the $250,000 is between the defendants and Grand Harvest.

I, therefore, hold that the defendants do not have any interest in the property to enable them to lodge the caveat.

In the result, there will be order in terms of prayers 1 and 2 of the summons. The damage or loss, if any, is to be assessed by the registrar. The defendants to pay costs.

Plaintiffs' application allowed.

Solicitors: *Bernard Rada & Lee; KL Tan & Associates.*

Reported by *Teoh Ai Lin*

Wardley Ltd v Tunku Adnan & Anor

HIGH COURT (SINGAPORE) — SUIT NO 1779 OF 1989
SELVAM JC
11 APRIL 1991

Banking — Multi-currency loan agreement — Guarantee under multi-currency loan — Currency of payment under the loan — Whether guarantors required to pay on guarantee in Swiss francs or Australian dollars — Whether guarantors required to pay interest at the rate contracted in the loan agreement or at the statutory rate stipulated by O 42 r 12 of the Rules of the Supreme Court 1970

Civil Procedure — Interest after judgment — Whether plaintiffs entitled to such interest at contractual rate (higher than statutory rate) — Function of court to construe the interest provision — Whether ancillary or independent term — Nature of proceedings to be ascertained — Whether against the security or the debtor

Contract — Guarantee and indemnity — Construction of — Liability of guarantors (defendants) to repay the loan in the same manner as the borrowers — Determining the 'money of payment'

Words and Phrases — 'As well after as before judgment'

The defendants were guarantors of a loan made by the plaintiffs to four Malaysian borrowers. The loan was for an equivalent amount in Eurocurrency of A$1.160m which the borrowers required for the purchase of properties in Australia. In the event of default, interest was payable at 4½% pa above deposit rate ('the contractual interest'). The loan was eventually made in Swiss francs. The plaintiffs applied for and obtained judgment for the outstanding principal sum and contractual interest against the borrowers. The present action was brought by the plaintiffs against the defendants on the ground that contractual interest was payable after judgment and that the loan was to be repaid in Swiss francs and not Australian dollars.

Held, dismissing the defendants' appeal and allowing the plantiffs' cross-appeal:

(1) Parties to a transaction may always make their own arrangements regarding money of account and money of payment. The loan agreement clearly provided that the money of account and money of payment was the Swiss franc. Consequently the guarantors are liable to pay in Swiss francs.

(2) The function of a court presented with a claim for a contractual rate of interest higher than the statutory rate is to construe the interest provision and characterize it as an ancillary or independent term. In the instant case, the interest provision was expressed as an independent term which would survive any judgment for the principal debt. The plaintiffs were, therefore, entitled to judgment for interest at the contractual rate until payment.

Per curiam: The *Sim Lim* case[1] was decided on an incorrect reading of the *Economic Life Assurance* case.[5] The registrar's decision in that case had in effect introduced words into O 42 r 12 of the Rules of the Supreme Court 1970 without justification.

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No 64 of 1991.]

Cases referred to

1 *Sim Lim Finance Ltd* v *Pelandok Enterprises Pte Ltd* [1981] 1 MLJ 280 (not folld)
2 *Woodhouse AC Israel Cocoa Ltd SA & Anor* v *Nigerian Produce Marketing Co Ltd* [1971] 2 QB 23 (CA); [1972] AC 741 (HL) (refd)
3 *Miliangos* v *George Frank (Textiles) Ltd* [1976] AC 443 (folld)
4 *Ex p Fewings* (1883) 25 Ch D 338 (folld)
5 *Economic Life Assurance Society* v *Usborne & Ors* [1902] AC 147 (folld)
6 *Re European Central Railway Co, ex p Oriental Financial Corp* (1876) 4 Ch D 33 (refd)
7 *MBF Finance Bhd* v *Malaysia Air Charter Co Sdn Bhd & Ors* [1987] 2 MLJ 718 (refd)
8 *Re Agriculturist Cattle Insurance Co, ex p Hughes* (1872) 4 Ch D 34 (refd)
9 *Popple* v *Sylvester* (1882) 22 Ch D 98 (refd)
10 *Malaysia Building Society Bhd* v *Lim Kheng Kim & Ors* [1988] 3 MLJ 175 (refd)
11 *Malaysian International Merchant Bankers Bhd* v *Dhanoa Sdn Bhd* [1988] 1 MLJ 257 (refd)

Legislation referred to

Rules of the Supreme Court 1970 O 42 r 12
Judgments Act 1838 [UK] s 17

Steven Ang for the plaintiffs.
R Chandra for the defendants.

Cur Adv Vult

Selvam JC: There are two appeals before me as the judge-in-chambers ('this court'). They arose out of an action commenced by a merchant bank, Wardley Ltd ('the bank'). The defendants were guarantors of a loan made by the bank ('the guarantors'). The loan was made to four Malaysian borrowers ('the borrowers').

By an agreement dated 30 July 1984 and entered into between the bank and the borrowers, the bank agreed to grant a loan for an equivalent amount in Eurocurrency of A$1.160m ('the loan agreement'). The loan agreement defined Eurocurrency as 'Swiss francs, United States dollars or any other currency, deposit of which was for the time being generally available to the bank in the Singapore Inter-Bank Market'. The borrowers required the loan for the purchase of properties in Australia which was to be paid for in Australian dollars.

The loan agreement further provided that the drawing of the loan would be made 'in the relevant Eurocur-